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Supreme Court, U.S.
FILED
JAN 27 1994
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No. 93-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

LEON CLIFFORD FOSTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Respondent accepts the government's statement of the case as set forth in its petition.[1]

II. REASONS FOR NOT GRANTING THE PETITION

A. This court should not grant the government's petition merely to correct an error of law.

Assuming, for the sake of argument, that the Ninth Circuit erred in holding that in a Section 846 conspiracy the trial court is required to instruct the jury that it must find an overt act, this Court should not grant the government's petition. As Chief Justice Rehnquist has admonished, we "must never forget that this Court is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 367 (1982) (Rehnquist, C.J., dissenting). Justice Stevens has similarly noted that the certiorari jurisdiction of the Supreme Court is "designed to serve purposes broader than the correction of error in particular cases." Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring). See also Dobbs v. Zant, 113 S.Ct. 835, 836 (1993) (Scalia, J., concurring).

In sum, this Court should not grant the government's petition merely because the decision below may be erroneous.

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[1]However, the instant case arose in the Eastern District of California, not, as the government asserts and as the first page of the slip opinion mistakenly states, in the District of Arizona.

B. That the Ninth Circuit requires proof of an overt act in an 846 conspiracy is not an important and recurring issue.

In asking this Court to grant certiorari, the government asserts that the question whether Section 846 requires proof of an overt act is "important and recurring." Pet. 6. This is not so. As far as undersigned counsel can determine, there are only a handful of cases in which the Ninth Circuit has ever reversed a conviction for failure to instruct the jury on the overt act requirement.[2] Hence, contrary to the government's suggestion, the issue is not important and recurring.

It is no surprise that instances of reversal are few. In the first place, it is the rare case indeed where the government chooses to (or needs to) allege a conspiracy without also alleging an overt act. This is so because an overt act is so easy to allege and prove; after all, it may be any act, however innocuous, that serves in amy manner to further the conspiracy. Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960) (overt act may appear wholly innocent); 8.05A Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992)("an overt act does not itself have to be unlawful"); 2 LaFave and Scott, Substantive Criminal Law (1986) § 6.5 at p. 95 ("virtually any act will satisfy the overt act requirement").

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[2]These cases are 1) the case at bar, an unpublished decision; 2) United States v. Shabani, 993 F.2d 1419 (9th Cir. 1993), pet. for cert. pending, No. 93-981 (filed Dec. 21, 1993); and 3) United States v. Simpson, 10 F.3d 645 (9th Cir. 1993).

In the second place, even if an indictment does not allege an overt act, it will commonly allege the functional equivalent; namely, a substantive crime committed during, or in furtherance of, the conspiracy. In this event, any error arising from the failure of the court to instruct on the overt act requirement is harmless. See United States v. Garcia, 988 F.2d 965, 969 (9th Cir. 1993) (omission of overt act element harmless where the jury's determination of guilt on another substantive count served as the functional equivalent of a finding of an overt act); United States v. Baldwin, 987 F.2d 1432, 1439 (9th Cir. 1993)(same); United States v. Harrison-Philpot, 978 F.2d 1520, 1526-27 (9th Cir. 1992), cert. denied 113 S.Ct. 2392 (1993).

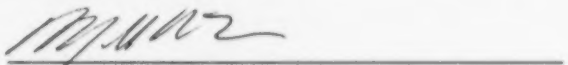
In its petition for certiorari in Shabani, the government argues that, if applied beyond Section 846, the Ninth Circuit's analysis would "call into question" the construction of many criminal conspiracy statutes that contain no express overt act requirement, for example, the civil rights conspiracy statute, 18 U.S.C. Sec. 241. Shabani Pet. at 16. The instant case, however, unlike Shabani, is unpublished. Hence, the government understandably does not make the same argument here. In any event, the government's concerns are groundless. See Shabani, 993 F.2d at 1420-21 ("when we have interpreted other conspiracy statutes that are silent on the subject, we have held that proof of any overt act is unnessary); United States v. Skillman, 922 F.2d 1370, 1375-76 (9th Cir. 1990) (Section 241 conspiracy does not require overt act), cert. dismissed, 112 S.Ct. 353 (1991).

In sum, contrary to the government's argument, the issue raised in its petition is neither important nor recurring. This Court should not waste its scarce resources in granting certiorari either to Shabani or to the case at bar.

C. Even assuming this Court grants certiorari in Shabani, it should deny certiorari in the instant case.

The government suggests that the Court should hold the instant case pending the Court's decision in Shabani. Pet. 7. Respondent disagrees. Unlike Shabani, the instant case is unpublished. Hence, it is valueless as precedent and may not even be cited. See Ninth Circuit Rule 36-3; DiMartini v. Ferrin, 889 F.2d 922, 929 (9th Cir. 1989). Accordingly, even should the Court grant certiorari in Shabani, the Court should deny it here.

RESPECTFULLY SUBMITTED this January 25, 1994.



Michael R. Levine
Attorney for Respondent

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UNITED STATES OF AMERICA,

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Respondent.

CERTIFICATE OF SERVICE

I, Michael R. Levine, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION TO LEAVE TO PROCEED *IN FORMA PAUPERIS* and RESPONDENT'S BRIEF IN OPPOSITION TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon, on January 24, 1994, first class postage prepaid, a certified true, exact, and full copy thereof addressed to:

Drew S. Days III
Solicitor General
Department of Justice, #5614
10th and Constitution
Washington, D.C. 20530

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Further, the original and twelve (12) copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C. 210543, for filing on January 24, 1994, with first-class postage prepaid.

DATED this January 25, 1994.

Michael R. Levine
Attorney for Respondent.

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of JANUARY, 1994.

Notary Public for Oregon